

IN THE  
**ARIZONA COURT OF APPEALS**  
DIVISION TWO

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GARY S. GALLOWAY,  
*Petitioner,*

*v.*

HON. ANNA M. MONTOYA-PAEZ,  
JUDGE OF THE SUPERIOR COURT OF THE STATE OF ARIZONA,  
IN AND FOR THE COUNTY OF SANTA CRUZ  
*Respondent,*

*and*

CHERYL GALLOWAY,  
*Real Party in Interest.*

No. 2 CA-SA 2015-0041  
Filed August 27, 2015

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THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND  
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
NOT FOR PUBLICATION  
*See* Ariz. R. Sup. Ct. 111(a)(3), (c); Ariz. R. Civ. App. P. 28(a)(2);  
Ariz. R. P. Spec. Actions 7(g), (i).

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Special Action Proceeding  
Santa Cruz County Cause No. DO13291

**JURISDICTION ACCEPTED; RELIEF GRANTED**

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COUNSEL

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& Villamana, P.C., Tucson  
By Randi L. Burnett  
*Counsel for Petitioner*

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**MEMORANDUM DECISION**

Judge Espinosa authored the decision of the Court, in which Presiding Judge Miller and Chief Judge Eckerstrom concurred.

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ESPINOSA, Judge:

¶1 Petitioner Gary Galloway seeks special action relief from the respondent judge's order awarding his former wife, Cheryl Galloway, temporary spousal maintenance in the amount of \$5,000 per month. Because we conclude the respondent failed to apply the appropriate legal standard in determining the amount of maintenance, we accept special action jurisdiction, vacate the respondent's order, and order further proceedings.

**Discussion**

¶2 Special action relief is available when there is no "equally plain, speedy, and adequate remedy by appeal." Ariz. R. P. Spec. Actions 1(a). A temporary order for spousal maintenance is not appealable, and Gary therefore has no "equally plain, speedy, and adequate remedy by appeal." *Villares v. Pineda*, 217 Ariz. 623, 625, ¶¶ 10-11, 177 P.3d 1195, 1196-97 (App. 2008). We therefore accept special action jurisdiction.

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¶3 Gary and Cheryl owned and worked for a tire company in Texas. They sold the company in 2002 and bought property in Patagonia where they built a house. Gary continued to work as a consultant to the tire company, specifically as to its dealings with Toyota, making \$39,000 a year, working less than ten hours a week. Although Gary also did some construction work, he testified the couple was “bleeding cash,” and they put the house up for sale in 2010. At the time of the instant proceedings, it had not sold. Cheryl moved to an assisted living facility in 2013 due to alcohol-related dementia and filed for divorce later that year. The community owned a second piece of real property, purchased as an investment, which was apparently sold after the hearing on this matter.

¶4 On appeal, Gary does not dispute that Cheryl is permanently disabled or that she is entitled to spousal maintenance. Rather, he contests the amount of maintenance ordered by the respondent judge. He argues the respondent failed to consider his income and expenses when setting the amount of maintenance at \$5,000 a month, thereby failing to consider, as required, a relevant factor under A.R.S. § 25-319(B). “We review [an] award of spousal maintenance for an abuse of discretion.” *Gutierrez v. Gutierrez*, 193 Ariz. 343, ¶ 14, 972 P.2d 676, 681 (App. 1998).

¶5 On the record before us, the respondent judge appears to have considered Gary’s ability to pay, but believed he could earn more than his current income. The respondent rejected Gary’s testimony about his income and ability to earn, stating, “The testimony, expenses and assets of the parties do not add-up.” The respondent also noted Gary “is under-employed” and had not “tried to obtain employment at the level of his ability.” Gary is correct that a court abuses its discretion by attributing an income to a spouse that is not supported by the evidence presented.<sup>1</sup> See *Leathers v. Leathers*, 216 Ariz. 374, ¶ 13, 166 P.3d 929, 932 (App. 2007). But, in an appropriate case, a court may determine that a party has the ability to earn more and has voluntarily reduced income, and may base a maintenance award on that higher amount. See *Gutierrez*, 193 Ariz.

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<sup>1</sup>In her response to Gary’s petition, Cheryl in large part contends he is under-earning as well.

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343, ¶¶ 22-23, 972 P.2d 676, 682 (App. 1998) (contrasting voluntarily reduced income with “speculation” about ability to earn more).

¶6 In determining whether it is appropriate to attribute greater income to a party when a voluntary reduction of income is alleged, this court has adopted a balancing test involving five factors:

- (1) The reasons asserted by the party whose conduct is at issue;
- (2) The impact upon the obligee of considering the actual earnings of the obligor;
- (3) When the obligee’s conduct is at issue, the impact upon the obligor of considering the actual earnings of the obligee and thereby reducing the obligor’s financial contribution to the support order at issue;
- (4) Whether the party complaining of a voluntary reduction in income acquiesced in the conduct of the other party; and
- (5) The timing of the action in question in relation to the entering of a decree or the execution of a written agreement between the parties.

*Pullen v. Pullen*, 223 Ariz. 293, ¶ 18, 222 P.3d 909, 913-14 (App. 2009).

¶7 The record before us contains little evidence relating to these factors. And nothing in the respondent judge’s ruling suggests she considered them. As noted above, if the court determines that a voluntary reduction in income has been made, it may attribute greater income to a party. See *Reeves v. Reeves*, 146 Ariz. 471, 472, 706 P.2d 1238, 1239 (App. 1985), citing *Patterson v. Patterson*, 102 Ariz. 410, 415, 432 P.2d 143, 148 (1967); see also *Kamrath v. Kamrath*, 17 Ariz. App. 394, 395, 498 P.2d 468, 469 (1972) (trial court may reject husband’s “‘modest income’ argument” based on “substantial net worth . . . and a manner of living which belied th[e] claim”). Before doing so here, however, the respondent should have applied the appropriate legal standard as set forth in *Pullen*.

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**Disposition**

¶8 We accept special action jurisdiction and grant relief. As evident in its order, the respondent judge's ruling was not based on evidence of Gary's current income, but rather on his ability to earn; thus the respondent impliedly concluded he had voluntarily reduced his income. To reach such a conclusion, however, it was necessary to consider the appropriate factors. The respondent's order is therefore vacated, and she is directed to hold further proceedings consistent with this decision.